Majlis Perbandaran Subang Jaya v Pacific Valiant Sdn Bhd (formerly known as Mayland Valiant Sdn Bhd)

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 21NCVC-160–09 OF 2012
ABD MAJID JC
7 OCTOBER 2019

Civil Procedure — Damages — Assessment of damages — Application for directions for assessment of damages pursuant to judgment obtained — Whether filed out of time — Whether exceeded one month period stipulated under O 37 r 1 of the Rules of Court 2012 — Whether one month period for filling mandatory and required strict compliance — Whether extension of time for filling should be allowed — Rules of Court 2012 O 37 r 1(1)

The defendant had made two applications: (a) application for directions for assessment of damages ('encl 274'); and (b) application for extension of time to file notice for directions and notice of appointment of assessment of damages ('encl 277'). On 29 June 2016, the High Court allowed the plaintiff's claim and dismissed the defendant's counterclaim. The defendant thereafter appealed against the decision. On 24 April 2018, the Court of Appeal allowed for the defendant's appeal; set aside the plaintiff's claim; and allowed for the defendant's counterclaim. The case was remitted back to the High Court for assessment of damages. The plaintiff then applied for leave to appeal to the Federal Court but the application was refused. The notice for directions for assessment of damages was filed on 6 December 2018 pursuant to the order of the Court of Appeal earlier. The plaintiff contended that: (a) the notice for directions was filed out of time and should have been filed on 23 March 2018, ie: within a month from 24 April 2018, when the Court of Appeal allowed the defendant's appeal. Instead, the defendant had filed the notice on 6 December 2018; (b) hence, the defendant was in contravention of O 37 r 1 of the Rules of Court 2012 ('the Rules') which was mandatory in nature; and (c) the defendant's application for extension of time to file the notice for directions should be refused.

Held, allowing defendant's application in encls 274 and 277 with costs:

(1) With regards to the issue of whether the one month prerequisite is mandatory or directory, there were conflicting decisions of the High Court. In the latest Court of Appeal decision where O 37 is concerned (*Tetuan Sri Ling & Assocs v Lian Meng Wah*), if there are strong and plausible grounds for not complying with the one month prerequisite, the notice should be accepted. The defendant had explained that it filed

A the notice for directions after the Federal Court refused the leave application by the plaintiff. It was not disputed that the plaintiff applied for a stay and it was allowed by the Federal Court and upon the refusal of the leave application, the defendant filed the said notice within the one month period. Therefore, the preliminary objection by the plaintiff was B dismissed (see paras 11–13).

(2) Order 3 r 5 would apply to O 31 r 1 of the Rules to allow the extension of time. Although the provision of one month was mandatory, the court was vested with the direction to allow abridgment of time. The reasons C given by the defendant for the delay in filling for the notice for direction were not flimsy but valid and plausible. The delay was less than six months and the plaintiff was fully appraised of the prayers or reliefs sought for in the defendant's counterclaim. The plaintiff would not be prejudiced nor injustice caused if the defendant's application for D extension of time was allowed (see paras 20–21 & 23).

[Bahasa Malaysia summary

Defendan telah membuat dua permohonan: (a) permohonan untuk arahan untuk penilaian gantirugi ('lampiran 274'); dan (b) permohonan untuk E lanjutan masa untuk memfailkan notis bagi arahan dan notis pelantikan penilaian gantirugi ('lampiran 277'). Pada 29 Jun 2016, Mahkamah Tinggi membenarkan tuntutan plaintif dan menolak tuntutan balas defendan. Defendan kemudiannya merayu terhadap keputusan itu. Pada 24 April 2018, Mahkamah Rayuan membenarkan rayuan defendan; mengetepikan tuntutan F plaintif; dan membenarkan tuntutan balas defendan. Kes itu dihantar kembali ke Mahkamah Tinggi untuk penilaian gantirugi. Plaintif kemudian memohon kebenaran untuk merayu kepada Mahkamah Persekutuan tetapi permohonan itu ditolak. Notis bagi arahan untuk penilaian gantirugi difailkan pada 6 Disember 2018 menurut perintah Mahkamah Rayuan sebelum ini. Plaintif G berpendapat bahawa: (a) notis arahan telah difailkan di luar masa dan sepatutnya difailkan pada 23 Mac 2018, iaitu: dalam masa sebulan dari 24 April 2018, apabila Mahkamah Rayuan membenarkan rayuan defendan. Sebaliknya, defendan telah memfailkan notis itu pada 6 Disember 2018; (b) oleh itu, defendan telah melanggar A 37 k 1 Kaedah-Kaedah Mahkamah H 2012 ('Kaedah-Kaedah') yang bersifat mandatori; dan (c) permohonan defendan untuk lanjutan masa untuk memfailkan notis untuk arahan hendaklah ditolak.

Diputuskan, membenarkan permohonan defendan dalam lampiran 274 dan I 277 dengan kos:

(1) Berhubung dengan isu sama ada prasyarat satu bulan adalah mandatori atau direktori, terdapat keputusan yang bertentangan di Mahkamah Tinggi. Dalam keputusan Mahkamah Rayuan yang terkini di mana A 37 (*Tetuan Sri Ling & Assocs v Lian Meng Wah*), jika terdapat alasan kukuh

dan munasabah untuk tidak mematuhi prasyarat satu bulan, notis itu harus diterima. Defendan memfailkan notis untuk arahan selepas Mahkamah Persekutuan menolak permohonan kebenaran oleh plaintif. Ini tidak dipertikaikan bahawa plaintif memohon untuk penggantungan dan ia dibenarkan oleh Mahkamah Persekutuan dan selepas penolakan permohonan kebenaran, defendan memfailkan notis dalam tempoh satu bulan Oleh itu, bantahan awal oleh plaintif telah ditolak (lihat perenggan 11–13).

(2) Aturan 3 k 5 akan diguna pakai untuk A 31 k 1 Kaedah-Kaedah untuk membenarkan lanjutan masa. Walaupun peruntukan satu bulan adalah mandatori, mahkamah telah diberi hak untuk membenarkan penyingkatan masa. Sebab-sebab yang diberikan oleh defendan untuk kelewatan dalam memfailkan notis untuk arahan adalah tidak lemah tetapi sah dan munasabah. Kelewatan itu adalah kurang daripada enam bulan dan plaintif telah dinilai sepenuhnya daripada permohonan atau relif yang dipohon dalam tuntutan balas defendan. Plaintif tidak akan diprejudis atau ketidakadilan tidak akan berlaku jika permohonan defendan untuk lanjutan masa dibenarkan (lihat perenggan 20–21 & 23).]

Cases referred to

Ali bin Jeman v Indranika Jaya Sdn Bhd & Ors [2016] MLJU 1485; [2016] 1 LNS 1795, HC (refd)

Aminah bte Abas v Pentadbir Tanah Daerah Kuantan [2003] 4 MLJ 669, HC (refd)

Cosway (M) Sdn Bhd & Anor v Gan Poh Im [2006] 1 MLJ 568; [2005] 2 MLRA 284, CA (refd)

DJ Auto Components Manufacturing Sdn Bhd v FBK Systems Sdn Bhd [2019] MLJU 968; [2019] 1 LNS 1149, HC (refd)

Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal [2009] 4 MLJ 149, FC (refd)

JMB Silverpark Resort v Silverpark Sdn Bhd [2015] MLJU 863; [2015] 1 LNS 890, HC (refd)

Kilo Asset Sdn Bhd v Hew Tai Hong [2016] 1 MLJ 785; [2016] 1 MLRA 576, FC (folld)

Low Cheng Soon v TA Securities Sdn Bhd [2003] 1 MLJ 389, CA (refd)

Lucy Wong Nyuk King (F) & Anor v Hwang Mee Hiong (f) [2017] MLJU 2351; [2017] 1 LNS 2256, HC (refd)

Md Yusoff bin Ahmad v Siti Hajar bt Sarkawi & Anor [2013] 1 MLJ 329; [2013] 1 CLJ 200, CA (refd)

National Union of Bank Employees v Director General of Trade Unions & Anor [2013] 6 MLJ 167; [2013] 5 AMR 729, FC (refd)

A *Nusantara Nilam Sdn Bhd v Hicks Flat Jmb* [2018] MLJU 757; [2018] 1 LNS 817, HC (refd)
Pemunya Kapal MV Brihope & Ors v Emmanuel E Okwuosa & Ors [1997] 1 MLJ 453; [1995] 2 MLRA 615, CA (refd)
Petra Perdana Berhad v Tengku Dato' Ibrahim Petra bin Tengku Indra Petra &
B *Ors* [2017] MLJU 410; [2017] 1 LNS 422, HC (refd)
Saeed U Khan v Lee Kok Hooi [2001] 5 MLJ 416, HC (refd)
Tetuan Sri Ling & Assocs v Lian Meng Wah [2015] 3 CLJ 63, CA (refd)
Vellasamy Ponnusamy & Ors v Gurbachan Singh Bagawan & Ors [2019] MLJU 1437; [2019] 1 LNS 431, HC (refd)

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Legislation referred to

Companies Act 1965 s 145A
Rules of Court 2012 O 1A, O 2 r 3, O 3 r 5, O 37, O 37 r 1, 1(3)
Rules of the High Court 1980 O 1A, O 3 rr 5, 8, O 6 r 7(1), (2), (2A), O
D 55 r 2(1), Form 111B

Karim Lim Ai Ching (M Murgan with him) (Presgrave & Matthews) for the appellant.
Clinton Nicholas Gomez (Rajindar Singh Veriah & Co) for the respondent.

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Abd Majid JC:

[1] There are two applications namely encl 274 the defendant's application for directions for assessment of damages and encl 277 the defendant's
F application for an extension of time to file both the notice for directions and notice of appointment for assessment of damages. Having heard the submissions, I allowed both the applications. The plaintiff now appeals.

ENCLOSURE 274

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[2] On 29 June 2016 the Shah Alam High Court allowed the plaintiff's claim and dismissed the defendant's counterclaim. The defendant thereafter appealed against the said decision. The Court of Appeal on 24 April 2018 allowed the defendant's appeal and set aside the decision of the High Court.
H The defendant's counterclaim was allowed. The case was remitted back to the High Court for assessment of damages.

[3] The plaintiff not being satisfied with the decision of the Court of Appeal applied for leave to appeal to the Federal Court on 22 May 2018 and
I the application was refused on 7 November 2018.

[4] The notice for directions for assessment of damages ('notice for directions') was filed on 6 December 2018 pursuant to the order of the Court of Appeal earlier.

PRELIMINARY OBJECTION

[5] The plaintiff at the outset has raised a preliminary objection contending that the notice for directions was filed out of time. According to the plaintiff the said notice should have been filed within a month from 24 April 2018 when the Court of Appeal allowed the defendant's appeal. The last date being 23 May 2018 but here the defendant filed it on 6 December 2018 in contravention of O 37 r 1 of the Rules of Court 2012 ('the RC 2012'). The said provision is mandatory in nature and cannot be relaxed. Learned counsel for the plaintiff referred to *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal* [2009] 4 MLJ 149 which held that O 1A of the RC 2012 cannot be invoked where there was a mandatory prerequisite.

[6] Learned counsel referred to *Tetuan Sri Ling & Assocs v Lian Meng Wah* [2015] 3 CLJ 63 which also held that the filing of the notice for directions must be made within a month and to be followed by the filing of the notice of appointment for assessment of damages within six months from the date of judgment. References were also made to *Aminah bte Abas v Pentadbir Tanah Daerah Kuantan* [2003] 4 MLJ 669, *Low Cheng Soon v TA Securities Sdn Bhd* [2003] 1 MLJ 389 and *JMB Silverpark Resort v Silverpark Sdn Bhd* [2015] MLJU 863; [2015] 1 LNS 890 which held that the word 'shall' indicates that the act to be done was mandatory.

[7] In reply the defendant did not deny the one month requirement to file the said notice but when the Court of Appeal handed down its decision on 24 April 2018, the plaintiff sought for a stay and the defendant did not object. The leave application and application for stay were filed on 22 May 2018. The defendant contended that had it filed the notice for directions before 23 May 2018, it would prejudice the defendant if the Federal Court allowed the stay. In fact, the Federal Court did allow the stay on 1 October 2018 following the concession of the defendant. Further the sealed order of the Court of Appeal was only served on the defendant on 1 October 2018.

[8] The Federal Court heard the application for leave on 7 November 2018 and dismissed the same and thereafter the defendant filed the said notice. The defendant further averred that when the plaintiff filed the application for stay, it impliedly meant that the plaintiff itself wanted the assessment to be put on hold pending the disposal of the appeal by the Federal Court. Therefore, there was no delay on the part of the defendant in filing the said notice as it was done within one month from the date of dismissal of the application for leave by the Federal Court.

[9] Learned counsel for the defendant submitted that notwithstanding the

word 'shall' being used in O 37 r 1 of the RC 2012 the High Court in *Petra Perdana Berhad v Tengku Dato' Ibrahim Petra bin Tengku Indra Petra & Ors* [2017] MLJU 410; [2017] 1 LNS 422 held that the one month requirement was not mandatory. It was also held in *Md Yusoff bin Ahmad v Siti Hajar bt Sarkawi & Anor* [2013] 1 MLJ 329; [2013] 1 CLJ 200 where the Court of Appeal in dealing with s 145A of the Companies Act 1965 on company's meetings within Malaysia was directory notwithstanding the usage of the word 'shall'.

[10] Learned counsel further referred to O 1A of the RC 2012 and submitted that interest of justice should be the foremost consideration and based on O 2 r 3 of the RC 2012 he submitted that the plaintiff was not prejudiced and there has been no substantial miscarriage of justice.

RULING

[11] I am aware of the conflicting decisions of the High Courts with regard to whether the one month prerequisite is mandatory or directory. To name a few they are *Lucy Wong Nyuk King (F) & Anor v Hwang Mee Hiong (f)* [2017] MLJU 2351; [2017] 1 LNS 2256, *Vellasamy Ponnusamy & Ors v Gurbachan Singh Bagawan & Ors* [2019] MLJU 1437; [2019] 1 LNS 431 and *Ali bin Jeman v Indranika Jaya Sdn Bhd & Ors* [2016] MLJU 1485; [2016] 1 LNS 1795 which held that the said prerequisite was mandatory as opposed to *Petra Perdana*, *Nusantara Nilam Sdn Bhd v Hicks Flat Jmb* [2018] MLJU 757; [2018] 1 LNS 817 and *DJ Auto Components Manufacturing Sdn Bhd v FBK Systems Sdn Bhd* [2019] MLJU 968; [2019] 1 LNS 1149 which decided otherwise. *Tetuan Sri Ling* was referred to in these cases except in *Petra Perdana* and *Nusantara Nilam*. In *DJ Auto* the learned High Court judge agreed with *Petra Perdana* and *Nusantara Nilam* that O 37 must be read as a whole and r 1(3) which allows the losing party to apply for assessment neutralises the one month prerequisite.

[12] I am aware that thus far *Tetuan Sri Ling* is the latest Court of Appeal decision as far as O 37 is concerned. Going by the doctrine of stare decisis the case is binding on me. Nevertheless, the Court of Appeal despite holding that the one month requirement to file the notice was mandatory, it went on to say at p 83:

> Having considered the circumstances leading to the order made by the learned judge in respect of encl 48, it would seem clear that there is serious non-compliance with O 37 on the part of LMW as regards the procedure that is required to be followed relating to assessment of damages. There was indeed no explanation proffered by LMW on the non-compliance with the law and the long delay of almost three years to file the notice of appointment for assessment of damages.

My understanding of this passage is, if LMW could provide a cogent explanation, encl 48 may be salvaged. There was no discussion on extension of time simply because it was never applied for. Unlike the case before me there is an application for extension of time which I will deal later. Taking the que from the passage quoted above, if there are strong and plausible grounds for not complying with the one month prerequisite, the notice should be accepted.

[13] Here, the defendant has explained that it filed the notice for directions after the Federal Court refused the leave application by the plaintiff. It was not disputed that the plaintiff applied for stay and it was allowed by the Federal Court and upon the refusal of the leave application the defendant filed the said notice within the one month period. Therefore, the preliminary objection is dismissed.

ENCLOSURE 277

[14] As alluded earlier this application concerns the defendant's application for extension of time to file the notice for directions and notice of appointment for assessment of damages ('notice of appointment'). The issues to be dealt with are whether abridgement of time can be allowed and whether O 37 r 1 of the RC 2012 is mandatory. I have referred to *Tetuan Sri Ling* earlier which to my understanding that the notice for directions can survive if the defendant could come up with a plausible explanation. In encl 277 the defendant applies for extension of time to file the same.

[15] In *Cosway (M) Sdn Bhd & Anor v Gan Poh Im* [2006] 1 MLJ 568; [2005] 2 MLRA 284 the previous counsel for the appellant made a mistake by filing the memorandum of appeal together with the appeal record which was not a requirement then and upon realising his mistake six weeks later the counsel re-filed the same memorandum which by then was already out of time. The High Court refused the appellant's application for an extension of time. The learned judge held that after the amendment to O 55 r 2(1) of the Rules of the High Court 1980 ('the RHC 1980') where the phrase 'or within such extended time as the High Court may allow' was deleted, the provision became mandatory. However, the Court of Appeal did not agree with her and Arifin Zakaria JCA (as he then was) speaking for the Court of Appeal at pp 32–33 said:

> The next question is whether the court has a discretion to extend the time. In considering the question, the learned High Court judge referred to the original O 55 r 2 of the RHC and the current one. The former reads as follows:
>
> > 2(1) The appellant shall, within fourteen days from the date of service on him of the notice referred to in Order 49, rule 3 sub-rule (2) of the Subordinate Courts Rules, 1980 or *within such extended time as the High Court may allow*, file in the

A High Court in duplicate a memorandum of appeal in Form 113A. (Emphasis added.)

The present provision of O 55 r 2(1) reads as follows:

B 2(1) The appellant *shall*, within fourteen days from the date of service on him of the notice in Form 141 under Order 49, rule 2 sub-rule (4) or rule 3 sub-rule (2) of the Subordinate Courts Rules 1980 (as the case may be), file in the High Court in duplicate a memorandum of appeal in Form 113A. (Emphasis added.)

She held that since the Rules Committee had removed the words 'or within such extended time as the court may allow' appearing in the original rule, therefore, the C 14 days prescribed under the present provision is a mandatory provision and has to be strictly complied with. With respect to the learned High Court judge, we do not think that the deletion of those words would deprive the court of its discretion to extend time, for such a discretion is expressly conferred by O 3 r 5(1) of the RHC which deals with extension or abridgment of time specified in the rules. On that premise, we hold that under the present provision of O 55 r 2(1) of the RHC, the D court still has the discretion to extend the time prescribed therein.

[16] Despite the word 'shall' being used and the amendment, the Court of Appeal applied O 3 r 8 of the Rules of High Court 1980 to extend the time. In E *National Union of Bank Employees v Director General of Trade Unions & Anor* [2013] 6 MLJ 167; [2013] 5 AMR 729 the Federal Court approached the issue by examining the nature of the non-compliance and secondly whether the non-compliance had seriously prejudiced the other party. It went on to decide that the delay in filing Form 111B after the leave was granted was a technical F non-compliance and hence, the appellant was granted the extension of time to file Form 111B for his judicial review application.

[17] The Federal Court in *Duli Yang Amat Mulia Tunku Ibrahim Ismail* held that O 1A of the RHC 1980 would not supersede the mandatory requirement G of O 6 r 7(1), (2) and (2A) of the RHC 1980. It was held that before a writ can be extended the plaintiff must satisfy r 7(2A). The three prerequisites were held to be mandatory.

[18] As regards O 1A of the RHC 1980, the learned Chief Justice at p 163 H had this to say:

The technical non-compliance of any rule may be remedied where there is an accidental omission or oversight by a party. A general provision such as O 1A of the RHC is for the court or judge to give heed to justice over technical non-compliance. It must not supersede a mandatory requirement of the Rules. Order 1A cannot be I invoked when a party intentionally disregards in complying with the Rules. Otherwise, parties would be encouraged to ignore the Rules. Thus in this case, O 1A of the RHC does not apply as the respondents had intentionally disregarded O 6 r 7(2A) for their own reasons.

His Lordship concluded by saying at p 164:

> In the context of the Rules of the High Court 1980 the phrase '... technical non-compliance ...' is thus a reference to non-compliance with a rule which is not fundamental or mandatory in nature.
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> ...
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> As I had mentioned in court, if O 1A is sought to be invoked whenever a party fails to comply with any provision of the rules, then the whole of the Rules of the High Court 1980 would be rendered useless. For example, can failure to enter appearance or file defence within the specified period be considered as an irregularity? Of course it cannot be. A party who is late in filing the relevant papers must obtain an order from the court to extend the time, if such extension is required and is permitted by the RHC. Therefore, the answer to question two is in the negative.

[19] The Federal Court did not consider O 3 r 5 of the RHC 1980 simply because O 6 r 7(2) and (2A) of the RHC 1980 had provided a built-in procedure for extension of the writ. The three factors considered in the case of *National Union of Bank Employees* for the purposes of O 3 r 5 of the RHC 1980 obviously would not apply to renewal of a writ. Therefore, to my mind O 3 r 5 of the RHC 1980/RC 2012 would apply to the other rules which do not have such built-in procedure.

[20] I am of the view that O 3 r 5 would apply to O 37 r 1 of the RC 2012 notwithstanding it is a mandatory provision. I find support in holding so in *Kilo Asset Sdn Bhd v Hew Tai Hong* [2016] 1 MLJ 785; [2016] 1 MLRA 576 where Raus Sharif PCA (as he then was) at p 584 said:

> We are of the view that although the wordings of r 30(2) of the Winding Up Rules seem to be mandatory in nature, one must not lose sight of the general powers of the court to abridge time as envisaged under rr 193 and 194(1) of the same.

Pemunya Kapal MV Brihope & Ors v Emmanuel E Okwuosa & Ors [1997] 1 MLJ 453 at p 470; [1995] 2 MLRA 615 at p 621 Mahadev Shanker JCA said:

> Order 32 r 13(2) of the RHC was specifically enacted to eradicate the rampant abuse of process by malevolent, indolent or unpaid practitioners who had devised a fall-safe method of causing unwarranted delays by filing affidavits at the last minute. The rule is mandatory. Of course, the court always has a discretionary power to extend time (see the Courts of Judicature Act 1964 item 8 of the Schedule and O 3 r 5 of the RHC 1980). But very powerful reasons must be advanced and the application for an extension should preferably be filed before time expired (in this case on 13 May or well before 7 June).

[21] Hence, it is clear although the provision is mandatory, the court is vested with the discretion to allow abridgement of time. The grounds for the delay in filing for the notice for directions and appointment have been referred to earlier. The one month period expired on 23 May 2018. The notice for directions was filed on 6 December 2018 slightly more five months which I do not think it is inordinate. The reasons are that the plaintiff applied for a stay of

A the Court of Appeal's decision/order and filed an application for leave to the Federal Court. The defendant did not oppose the application for stay. The stay was granted by the Federal Court on 1 October 2018 and eventually the leave was refused on 7 November 2018. The defendant filed the notice for directions on 6 December 2018. To me these reasons are not flimsy but valid and
B plausible.

[22] What is left now is whether the plaintiff will be prejudiced. In *Saeed U Khan v Lee Kok Hooi* [2001] 5 MLJ 416 the length of delay in taking an action was said to be an important factor whether prejudice had been occasioned. In
C *Cosway* it was held that the since the respondent was aware of the grounds of appeal upon which the appellants were relying, the respondent was not prejudiced by the appellants' application for extension of time to file the memorandum of appeal. In *National Union* it was held that the filing of Form 111B in a judicial review application would not prejudice the respondent
D as they had been served with the cause papers.

[23] Here, the delay was less than six months and the plaintiff is fully appraised of the prayers or reliefs sought for in the defendant's counterclaim. Thus, I do not think the plaintiff would be prejudiced or injustice is caused if
E the defendant's application for extension of time is allowed. In the circumstance, both encls 274 and 277 are allowed with costs.

Application in encls 274 and 277 allowed with costs.

F Reported by Mohd Kamarul Anwar

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